WILLIAM MCDONALD, ADMINISTRATOR OF DUNCAN MCARTHUR, DECEASED, PLAINTIFF IN ERROR, *v.* MATTHEW HOBSON.

Where the complainant and respondent in a suit in chancery entered into a mutual covenant, that, pending the suit, they would divide the money between them in certain proportions, and that if, in the said suit, it should be decreed that these were not the correct proportions, they would respectively pay the difference so as to conform to the decree; and the result of said suit was a dismissal of the complainant's bill, with costs; and the respondent brought an action of covenant against the complainant, reciting the agreement in his declaration, with an averment, that, by virtue of the decree of dismissal, he was entitled to receive a certain sum of money, — this declaration was bad.

The agreement looked to a judicial determination of the rights of the parties in some court of law or equity, and the declaration omits all averment that these rights had been so settled.

The decree of dismissal did not, of itself, prove that the complainant owed the respondent any thing. It only proved that the respondent was not indebted to the complainant.

Nor is this defect in the declaration cured by verdict. It cannot be presumed that evidence was given upon the trial to show that some decree had adjusted the amount due, as claimed in the declaration, because this would be presuming against the record, which recites the substance of the decree. A total omission to state any cause of action is a defect which a verdict will not cure.

The averment of the *virtute cujus* is insufficient either as matter of law or fact; — as law, because no such legal consequence could follow from the premises, and as fact, because the averment was in contradiction to the record itself.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Ohio.

There was no bill of exceptions in the case, but the whole record was brought up, upon the allegation of a fatal defect in it, because no cause of action was shown by the plaintiff below in his declaration.

Hobson, a citizen of Alabama, brought an action of covenant against McDonald, as the administrator of McArthur. As the whole case depended upon a very nice point of pleading, the Reporter has thought it proper to insert the whole of the declaration, which was as follows: —

"William McDonald, administrator of all and singular the goods, &c., of Duncan McArthur, deceased, (which said William is, and the said Duncan was, at the time of his death, a citizen and resident of the State of Ohio,) was summoned to answer unto Matthew Hobson, a citizen and resident of the State of Alabama, in the said United States of America, of a plea of covenant broken; and thereupon the said Matthew, by Wm. Key Bond and H. Stanbery, his attorneys, complains: for that whereas, heretofore, to wit, on the 25th day of September, A. D. 1830, at Chillicothe, in the said district of Ohio, by a certain article of agreement, made and executed, as well by the said Matthew as by the said Duncan, and sealed with their seals respectively, which said article being on file in this court,

as an exhibit in the case in chancery hereinafter mentioned, the said plaintiff is unable to make profert thereof, it was, among other things, witnessed: That whereas, on the 10th day of November, in the year of our Lord 1810, a contract was entered into by and between John Hobson and Matthew Hobson, (the said plaintiff,) of the one part, and Duncan McArthur, (the said defendant's intestate,) of the other part, providing for the withdrawal of certain entries of land-warrants, and the relocation of the same, as by reference to said contract will appear, since which time the said John Hobson had transferred his interest in said contract to the said Duncan McArthur; and whereas, on the 26th of May, 1830, the Congress of the United States passed and enacted a certain statute, in virtue of which it became competent for the parties to the said last-mentioned contract, as holders and owners of the reëntries made under said last-mentioned contract, to relinquish the same to the United States, and receive therefor the amount at which the lands included in said entries were valued by an inquest appointed by the United States, with interest, as by the said statute would appear. And whereas the said Matthew and Duncan were each willing to make such relinquishment to the United States, and avail themselves of the benefits of the said act of Congress, but had disagreed about their respective rights under said last-mentioned contract; in consequence of which said disagreement the said Duncan McArthur had then recently instituted a certain suit in chancery in the Supreme Court of the State of Ohio, in and for the county of Ross, in said State; and, among other things, had obtained an injunction in said cause, restraining the said Matthew Hobson from receiving any money under the said act of Congress, until the matters could be inquired into, as by reference to said suit would fully appear. And whereas, (as is further recited by said article of agreement first herein mentioned,) the said parties, to wit, the said Matthew and Duncan, were then mutually willing and anxious that the said money, so appropriated by the said act of Congress, or such part of it as should await the determination of said suit, should not remain inactive, and did therefore wish to put the whole matter in such state as would make the fine available and profitable, pending the same suit, but without in any manner affecting, or being held, or interpreted as affecting, their said controversy; in order to accomplish which it had then been determined and arranged, that the said Matthew should assign and transfer to the said Duncan all the interest of the said Matthew of, in, and unto the said entries and warrants in such way as would enable the said Duncan to receive from the United States the moneys aforesaid, out of which said money the said Duncan should at

once pay to the said Matthew the sum of eleven thousand five hundred dollars, and retain the balance of the same in his, the said Duncan's, possession; and the said Duncan, in and by the said article of agreement first herein mentioned, did covenant, to and with the said Matthew, that if, in the said suit so instituted as aforesaid, it should be held, adjudged, decreed, or determined, that the said Matthew, his heirs or assigns, executors or administrators, were, or should be, entitled to any greater portion of said money, directly or indirectly, than the said sum of eleven thousand five hundred dollars, then, and in such case, he, the said Duncan, his heirs, executors, or administrators, should and would pay to the said Matthew, his heirs, executors, administrators, or assigns, at the Bank of Chillicothe, any such excess over and above said sum, together with interest on such excess, from the day of the date of said article of agreement, which said covenant last aforesaid, it was provided by said article of agreement, should be held to embrace any judgment, order, or decree, which might produce the said result, whether made and rendered in said suit in chancery, or in any other suit, or before any other tribunal, founded on the same subject-matter or contract; and in and by said first-mentioned article of agreement, it was further witnessed, that the said Matthew Hobson did thereby covenant to and with the said Duncan McArthur, that in case it should be determined, held, ordered, adjudged, or decreed in said chancery suit, or before any other tribunal finally decided in a suit founded on the same subject-matter, that he, the said Matthew Hobson, was entitled to a less sum than the aforesaid sum of eleven thousand five hundred dollars, then, and in such case, he, the said Matthew Hobson, his heirs, executors, and administrators, should and would refund and pay to the said Duncan McArthur, his heirs, executors, administrators, or assigns, at the Bank of Chillicothe, the said amount so received by him beyond what he was entitled to, with interest thereon from the said date of said article of agreement.

"The said plaintiff further says, that, in performance of his covenant in that behalf in said article of agreement mentioned, he did, afterwards, to wit, on the said 25th day of September, A. D. 1830, at Chillicothe aforesaid, assign and transfer to the said Duncan McArthur all the interest of him, the said Matthew, of, in, and unto the said entries and warrants; which said assignment and transfer was then and there accepted and received by the said Duncan in discharge of the said covenant of the plaintiff in that behalf so made as aforesaid. In virtue of which said assignment and transfer, the said Duncan, afterwards, to wit, on the same day and year last aforesaid, at Chil-

licothe aforesaid, did receive from the United States the moneys so appropriated, amounting, in the whole, to a large sum of money, to wit, the sum of fifty-seven thousand six hundred and eight dollars.

"And the said plaintiff further says, that such proceedings were afterwards had in the said suit in chancery, referred to in said before-recited article of agreement, that afterwards, to wit, at the December term, A. D. 1831, of said Circuit Court for the Seventh Circuit and District of Ohio, the said suit in chancery was, on the petition of said Matthew Hobson, on the ground of his residence and citizenship in the State of Alabama aforesaid, removed to and docketed in the said Circuit Court; and such further proceedings were afterwards had in said suit, that the same was finally heard and decided before the Supreme Court of the United States at Washington, (to which said court the same had been taken by appeal from the decree of said Circuit Court,) at the January term thereof, A. D. 1842; and such decree was, by the said Supreme Court of the United States, then and there rendered, that it was adjudged and ordered, that the said Matthew Hobson should recover against the complainants in said suit, viz. Allen C. McArthur, James D. McArthur, Effie Coons, Mary Trimble, Eliza Anderson, Frances Walker, and John Kercheval, heirs at law of said Duncan McArthur, (he, the said Duncan, having deceased during the pendency of said suit, and the said last-mentioned complainants having been made parties thereto in his place and stead,) the sum of one hundred and sixty-six dollars and eighty-three cents, for his costs therein expended, and that he have execution therefor; and further, that the said cause should be, and the same thereby was, remanded to the said Circuit Court, with directions to the said last-mentioned court to dismiss the bill without prejudice.

"And afterwards, to wit, at the July term, A. D. 1843, of the said Circuit Court, to which the mandate of the said Supreme Court had been duly sent for execution of the said last-mentioned decree, the said bill was, by the order of said Circuit Court, in conformity with said mandate, dismissed without prejudice; all which will more fully and at large appear by reference to the record and proceedings of said suit in chancery, and the said mandate, and several orders and decrees therein, now in said court remaining.

"And the said plaintiff further avers, and in fact says, that, in virtue of the decree aforesaid, he is well entitled to have and demand of and from the said defendant, as administrator as aforesaid, a greater portion of the said moneys, so received by the said Duncan McArthur as aforesaid, than the said sum of

eleven thousand five hundred dollars, (which last-mentioned sum the plaintiff admits he received from said Duncan at and after the execution of said article of agreement,) to wit, the sum of three thousand two hundred and one dollars, with interest thereon from the said 25th of September, A. D. 1830. Of all which premises the said defendant, afterwards, to wit, on the 10th day of July, A. D. 1843, at Cincinnati, in the District of Ohio aforesaid, had due notice; yet neither the said Duncan, whilst in life, nor the said defendant, as administrator as aforesaid, since the decease of said Duncan, has at any time, though thereto requested, paid to said plaintiff the said last-mentioned sum of money, at the Bank of Chillicothe or elsewhere, or any part thereof, but the same to do have hitherto refused, and the same, with the accruing interest, still remains wholly due and unpaid. Wherefore the said plaintiff saith, that neither the said Duncan nor the said defendant, his administrator as aforesaid, hath kept the said covenant in that behalf, but the same is broken, to the damage of the said plaintiff of ten thousand dollars; and therefore he brings suit, &c.

"Bond & H. Stanbery, *Attorneys for Plaintiff.*"

The defendant demurred to this declaration, but his demurrer was overruled.

At December term, 1843, the defendant craved oyer of the agreement, and pleaded *non est factum* and *nul tiel record*. The plaintiff joined issue upon both pleas.

The case was submitted to the court upon both issues, neither party requiring a jury. The court decided in favor of the plaintiff upon both pleas, and assessed the damages at $5,833.30, with costs.

The defendant, McDonald, sued out a writ of error, and assigned the following causes:—

1st. That the declaration aforesaid, and the matters therein contained, are not sufficient in law to maintain the said action.

2d. That said judgment was given in favor of the said plaintiff, when, by the laws of the land, it ought to have been given for the defendant.

3d. It does not appear, from the record, that there was any cause of action in favor of the said plaintiff against the said defendant, at the commencement of this suit; but, on the contrary, it does appear, from the record, that there was no cause of action.

Upon this writ of error, the cause came up to this court.

It was argued by *Mr. Vinton*, for the plaintiff in error, and *Mr. Stanbery*, for the defendant in error.

Mr. Vinton made the following points:—

1st. Under the contract on which the suit was brought by Hobson, it was a condition precedent to his right to the money claimed, that he should obtain a decree in the suit mentioned in that contract establishing his right to it.

Such being the character of the contract, the declaration must aver the fulfilment of this condition precedent. 1 Chit. 351–401.

Till such condition precedent is performed, no action accrues on the contract. 1 Chit. 353; Doug. 683.

Every material *fact* which constitutes the ground of the plaintiff's action must be alleged in the declaration, and no proof at the trial can make good a declaration which contains no ground of action. Buxendon *v.* Sharp, 2 Salk. 662; Drowne *v.* Stimpson, 2 Mass. 444; Rushton *v.* Aspinwall, Doug. 683; Avery *v.* Hoole, Cowper, 825; 1 T. R. 145.

And after verdict nothing is to be presumed but what is expressly stated in the declaration, and is necessarily implied from those facts which are stated. Spieres *v.* Parker, 1 T. R. 141.

The averment in the declaration, that, by virtue of the decree set forth by plaintiff below, he was well entitled to the money he sued for, is an inference of law deduced from the facts averred, and as such not traversable. A traverse must be taken on matter of fact, not on matter of law. 1 Chit. 645; 1 Saund. 23, note 5; 11 Price, 343; 3 Wils. 234; 1 Moore & Payne, 803.

The only exception to the rule, that the *virtute cujus, pretextu,* or *per quod,* are not traversable, is when they are compounded of law and fact, which are connected together. Then a traverse may be taken for the purpose of trying the fact which is connected with the law. 1 Chit. 646; Beale *v.* Simpson, 1 Ld. Raym. 413; Trustees of Rochester *v.* Symonds. 7 Wendell, 396; 2 Blackf. 776; 2 Young & Jervis, 304; 1 Saund. 23, note 5; 11 Price, 343; 3 Wils. 234.

Mr. Stanbery, for defendant in error.

There are three causes of demurrer stated specially:—

1. That plaintiff has not shown any cause of action against McArthur, or his administrator.

2. That he has shown no breach of the covenant.

3. That there is nothing to show the plaintiff entitled to demand the said sum of $3,201, and interest.

The three grounds of demurrer are in effect one,—that no cause of action is shown; and though called, or intended for, a special demurrer, is in truth a general demurrer, for it relies on matter of substance, not of form.

We suppose the point intended to be made is, that we have not averred or shown how the final decree, which upon its face is simply a decree of dismissal, made the defendant liable to the payment of the $3,201.

Very clearly, the decree is not for any money; and if our action was upon that alone, we should show no case. It does not, *per se*, give us any action for any money. But our action is not founded on the decree, but on a covenant anterior to it.

In the sealed instrument containing that covenant, it is acknowledged, in such form as to estop any proof to the contrary, that certain lands belonging to this plaintiff and McArthur were to be paid for by the United States; that a controversy existed as to their relative rights to the land, which had led McArthur to commence a suit in chancery to enjoin the payment of the money by the United States; that both parties were anxious to make the fund available, and therefore they temporarily divide the fund, the plaintiff taking $11,500, McArthur all the residue. Upon this state of things the covenant is made; providing that the parties shall stand, as to the money, *in statu quo*, until the determination of the suit; and that if, directly or indirectly, by any decree to be made in such suit, it should be held that the $11,500 was less than Hobson's portion of the whole sum, or if such a result should in any way flow from any decree, then McArthur covenants to pay any excess that Hobson might be entitled to.

Now it is perfectly clear that the parties did not contemplate that the decree itself should be a decree for the money in dispute. A covenant to pay such a decree would be useless, for the decree itself would be better than the covenant to pay it. Besides, the express language is, that the covenant is to take effect upon any decree, which, directly or indirectly, should or might produce a result in favor of the plaintiff's right to a greater portion of the money than the $11,500.

In setting forth a decree, then, which is not a decree for the money, we show the sort of decree which is contemplated by the covenant; but yet not such a decree as, without further averment, would make a case against McArthur.

We do not stop, however, by showing the decree, but by positive averment state, that in virtue of it Hobson became entitled, under the covenant, to the sum stated beyond the $11,500. In effect, following the language of the covenant, we aver that this was a decree which produced that result.

Must we show, by averment, how a decree of dismissal produced the result alleged? That is the only question that can be made. In other words, must we introduce all our evidence into our declaration? Unquestionably we must, on the trial,

prove the allegation, that the liability to pay more than the $11,500 resulted from the covenant and the decree. We admit that, but cannot admit that we must spread all the evidence out in the declaration.

There are instances in which the mere averment of the fact is not good, without showing the manner; as where there is a covenant to pay money on the release of all actions. An averment that the plaintiff executed a release will not do, for it must appear how the release was made, i. e. by an instrument under seal, that the court may judge of its sufficiency.

In this case that doctrine does not apply. The fact of liability to pay is not dependent upon a technical thing that can only be done in one way, and which must always be alleged to have been done in that way.

Simply, the case is an action for so much money received by McArthur to Hobson's use; and the only reason why we might not recover in *indebitatus assumpsit* is, that the covenant under seal drives us to this action of the higher nature.

It well appears that a certain sum of money arising out of joint property of Hobson and McArthur was in the treasury of the United States. The parties differ in the division; McArthur files a bill to enjoin it in the treasury; they then agree that Hobson shall take $11,500, and McArthur the residue, amounting to $46,108, and to stand upon that division until the end of the suit pending. The plaintiff avers the suit to be ended, and that he is entitled to $3,201 of the moneys so received by McArthur beyond the amount he has received; and all this is admitted by the demurrer.

I confess I am not able to see why this is not a good declaration.

But the case does not now stand upon the demurrer to the declaration, but upon a writ of error after a finding or verdict for Hobson, and a judgment consequent on such verdict.

It appears that, at the December term, 1843, the court below overruled the demurrer, and the defendant then took leave to plead, and filed two pleas, — *non est factum* and *nul tiel record*. Issue being joined on these pleas, the trial thereof was submitted to the court at the July term, 1844, and there was a finding on both pleas for Hobson, an assessment of damages, and judgment.

If there were any objection that might have been sustained to the declaration in consequence of any supposed defective statement of the plaintiff's right to recover the $3,201, with interest from September 25, 1830, it is now, after verdict, to be intended that such defect was supplied in the proof. The rule on this subject is nowhere better laid down than by Lord Mansfield, in Rushton *v.* Aspinwall, Doug. 679: —

"But on looking into the cases, we find the rule to be, that where the plaintiff has stated his title or ground of action defectively or inaccurately, — because, to entitle him to recover, all circumstances necessary in form or substance to complete the title so imperfectly stated must be proved at the trial, — it is a fair presumption, after verdict, that they were proved; but that, where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and therefore there is no room for presumption."

In our declaration we set out the covenant with all necessary strictness, and aver that, in virtue of the decree, McArthur became bound to pay the money demanded. This averment, "in virtue of said decree," was traversable.

Where the *virtute cujus* contains only matter of law, it is not traversable; otherwise, where it is mixed with fact. Beal *v.* Simpson, 1 Ld. Raym. 408; Trustees of Rochester *v.* Symonds, 7 Wend. 392.

Now if the covenant had been limited to a decree which, *per se*, was to be a decree for the money, and had been to pay so much money as should be so decreed, the decree alone would fix the liability without reference to any fact *aliunde*. Such is not the covenant, nor such the decree contemplated by the parties.

The decree may be any decree which, directly or indirectly, that is in itself, or in reference to matter *dehors*, may produce the result.

When, therefore, we allege a decree which does not *per se* give us the money, or establish our right to it, and aver that, in virtue of it, we became, under the covenant, well entitled to a specific sum, the averment is clearly mixed with matter of fact, and is traversable, and must be proved at the trial, unless admitted by the pleadings.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States, held in and for the District of Ohio by the district judge.

The questions presented arise upon the record of judgment, no bill of exceptions having been taken to the rulings of the court at the trial. It is insisted that the declaration is fatally defective, and the judgment for that reason erroneous.

The action is covenant, brought by Matthew Hobson against William McDonald, as administrator of Duncan McArthur, deceased.

The declaration recites, that, on the 10th of November, 1810, a contract was entered into between the said Matthew and Duncan, providing for the withdrawal of certain entries of land-

warrants and relocation of the same; that on the 26th of May, 1830, Congress passed an act which enabled the parties, as holders and owners of these warrants, to relinquish the same, and receive their value in money; that the said Hobson and McArthur were each willing to make such relinquishment, and to avail themselves of the provisions of the act, but that they had disagreed as to their respective rights under the contract of 1810; in consequence of which disagreement, McArthur had commenced a suit in chancery in the State of Ohio against Hobson, and had obtained an injunction restraining him from receiving any of the moneys, under the act of Congress, until the matters in dispute should be settled; that both parties had then become anxious that the money, or such part of it as must otherwise await the determination of the suit, should not remain useless, and therefore desired to put their differences on such a footing as would make the fund available and profitable during the litigation, and, at the same time, without in any manner affecting the suit; that, in order to accomplish this, it had been agreed that Hobson should assign and transfer to McArthur all his interest in the said warrants, so as to enable him to receive the money from the government, out of which he should, at once, pay over to Hobson the sum of $11,500, and retain the balance; and the said McArthur did then and there covenant to and with the said Hobson, that if it should be adjudged and determined in the suit in chancery that the latter was entitled to a greater portion of the money than the $11,500, directly or indirectly, then and in such case McArthur would pay to him such further amount, with interest, at the Bank of Chillicothe. It was, at the same time, declared, that the covenant should be held to embrace any judgment or decree that might produce this result, whether rendered in the suit in chancery or in any other suit, or before any other tribunal, founded on the same subject-matter. And the said Hobson did also then and there covenant to and with McArthur, that in case it should be adjudged and determined in the suit in chancery, or in any other tribunal, that he was entitled to a less sum than the $11,500, then and in such case he would refund to McArthur the excess so received, with interest, at the Bank of Chillicothe.

The declaration, then, after setting out the transfer of the interest of Hobson in the land-warrants to McArthur, and also the receipt of the sum of $ 57,608 from the government by the latter, averred, that such proceedings were had in the suit in chancery, that it was removed into the Circuit Court of the United States, and that such further proceedings were there had, that it was finally heard and decided in the Supreme Court of the United States, at Washington, at the January term, 1842, to

which the same had been carried by appeal, and such decree was then and there rendered, as adjudged and ordered, that Hobson recover against McArthur $166.83 for his costs, and that the cause be remanded to the Circuit Court, with directions to dismiss the bill without prejudice, — all which was afterwards done at the following July term of the Circuit Court accordingly.

The plaintiff then avers, that, in virtue of the decree aforesaid, he is well entitled to have and demand of and from the defendant, as administrator as aforesaid, a greater portion of the said moneys, so received by McArthur, than the sum of $11,500, to wit, the sum of $ 3,201, with interest from the 25th of September, 1830, the date of the articles of agreement, — of all which the defendant had notice.

The usual breach is then set out, concluding to the damage of the plaintiff of $10,000.

The defendant put in a demurrer to the declaration, which was afterwards overruled by the court. He then craved oyer of the articles of agreement, and, after setting them out *in hæc verba*, plead, 1st, *non est factum*, and 2d, as to the decree, *nul tiel record*. Upon which issues were joined, and were found for the plaintiff, and the damages assessed at the sum of $ 5,833.30.

The question presented for our decision is as to the sufficiency of the declaration after verdict, and this depends upon the construction to be given to the articles of agreement upon which the action is founded, and as set forth in the pleadings.

The construction given by one pleader is, that the decree or order on the suit in chancery mentioned in the agreement, and upon which the right to any portion of the fund in dispute, beyond the $11,500 already received is made to depend, need not determine either the right to any excess beyond that sum, or, if any, the amount of it; but, on the contrary, either or both may be established by evidence independently of the proceedings in that or any other suit, and that the decree is material only as showing the suit to be at an end. Hence, after setting out the decree by which it appears that the bill of complaint had been dismissed with costs, the pleader proceeds to aver, that, in virtue of the decree, the said plaintiff is well entitled to have and demand of and from the defendant a greater portion of the said moneys, so received by the said McArthur, than the sum of $11,500, to wit, the sum of $ 3,201, with interest.

This, it is said, is an averment of a matter of fact, and not of a conclusion of law; and that, after verdict, the court must presume that evidence was given on the trial to establish the right of the plaintiff to the amount recovered over and above

the sum already received, and that, upon this ground, the judgment may well be sustained.

This is the view of the case, as set forth in the declaration, and which was sought to be sustained in the argument; and, conceding it to present the true construction of the articles of agreement, — though the averment is certainly informal and illogical in the mode of stating it, as it is difficult to perceive how the right to the sum of money claimed, or to any sum, can result to the plaintiff, even as a matter of fact, in virtue of a decree dismissing a bill in chancery against him, — yet, with the usual intendments of the law in support of a judgment after verdict, it might, perhaps, be deemed sufficient. The appellate court would presume that evidence had been required and given, under the averment, at the trial, to support the claim to the amount recovered. 1 Saund. 228, n. 1; 1 Chit. Pl. 589; 1 Maule & Selw. 234; Doug. 68; 7 Wend. 396.

But the court is of opinion, that the pleader has mistaken altogether the true construction of the agreement in the particular mentioned, and has placed the right of action upon ground not warranted by any of the stipulations of the parties. This will be apparent, on recurring for a moment to the agreement as set forth in the pleadings.

The recitals show, that a dispute had arisen in respect to the division of a large sum of money coming from the government, in which the parties were jointly interested, and that a suit had been commenced by McArthur against Hobson, in chancery, enjoining him from receiving any part of it, until their rights had been judicially determined. The effect of this proceeding was to tie up the fund in chancery, pending the litigation, and until the court could make a proper distribution. It was to remedy this inconvenience, and to enable the parties to possess themselves of the fund, pending the controversy, that the agreement in question was entered into, and which was, in substance, as follows. McArthur was to receive the whole of the money from the government, and at once pay over to Hobson $11,500, retaining in his possession the residue; and if, in the suit then pending, it should be determined, directly or indirectly, that Hobson was entitled to a larger amount for his share, then McArthur would pay such additional sum, with interest, at the Bank of Chillicothe; and, on the other hand, if it should be determined that Hobson's portion of the fund was less than the sum already received, he would refund the excess, with interest, to McArthur, at the same place.

The object of the parties was to procure the money from the government, where it was lying idle, and, at the same time, to

make a provisional distribution, without in any way interfering with the suit in chancery. That was to be carried on for the purpose for which it was originally commenced; but as a provisional division had taken place, it became necessary to provide for a special decree, having reference to the changed situation of the fund, and, as the suit had become an amicable one, to provide, also, for the payment of any sum that might be found due from either party. Hence the stipulation, that the decree should be made upon the basis of this provisional distribution, and that the parties should pay over at once any balance that might be found due, without further proceedings.

The strongest proof exists, in the agreement itself, that the parties did not intend to interfere with the settlement of their differences by the suit in chancery, or by some other suit to be instituted for that purpose; for the last article provides, that this contract shall not be used by either party in the suit pending, or in any other suit, or in any other court, or in any proceeding under the contract of 1810, as affecting or in any way changing the rights of either in the matters in dispute; but that the suit in chancery, or any suit which either might think proper to bring, should be conducted, in all respects, as though this contract had not been entered into.

We think, therefore, it is clear, the parties intended that their respective rights to the common fund in question should be settled and fixed by the chancery suit then pending, or by some other legal proceeding that might be instituted for the purpose; and that, when so settled, they would conform the provisional distribution already made to the decision, by paying over at once the amount adjudged to be due; for we have seen, that, instead of interfering with the suit which had been already commenced, great pains are taken to guard against any such consequence, and, as if apprehensive that their rights might not be definitively settled by that suit, provision is made for the institution of any other, by either party, before the same or any other tribunal having cognizance of the case.

In a word, the whole amount of the agreement is, to provide, first, for a provisional distribution of the fund, so that the money might be used pending the litigation; secondly, for a judicial determination of the controversy in respect to it, in some court of law or equity; and, thirdly, for the payment of any balance that might be found due from either, at the Bank of Chillicothe.

This being, in our judgment, the legal effect of the agreement, it is manifest that the pleader has failed to comprehend it, and has therefore failed to set out any cause of action in

the declaration. There is a total omission of any averment of the fact upon which the right of the plaintiff to any portion of the fund beyond the $11,500 is made to depend, namely a judgment, order, or decree awarding to him the amount. There is not only an omission of any such averment, but the contrary appears upon the face of the declaration, as the decree in the chancery suit is set out, and its contents particularly described.

It is a decree simply dismissing the bill of complaint, with costs. It may show that the defendant (now plaintiff) had not received more than his share of the money in the division, otherwise the bill would not have been dismissed; but not that the defendant was entitled to more, unless the dismissal of a bill is evidence that something is due from the complainant to the defendant.

Neither can we presume, even after verdict, that evidence was given at the trial, by which it was made to appear that the decree did determine that the amount which has been recovered in this suit was due from McArthur to the plaintiff; for this would be a presumption against the face of the record. That shows what decree was rendered, and any one of a different import would have been inadmissible under the pleadings.

Besides, there should have been an averment, not only that a decree was rendered in the suit in chancery, but that the sum claimed had been therein adjudged to the plaintiff. This is made the foundation of the right to the money, and, of course, of the action, by the agreement; and the omission is fatal to the judgment.

It is the case of a total omission to state any title or cause of action in the declaration, — a defect which the verdict will not cure, either at common law or by statute. Doug. 683; Cowp. 826; 1 Johns. 453; 2 ib. 557; 17 ib. 439.

The averment, that, in virtue of the decree, the plaintiff was well entitled to recover, &c., is insufficient, either as matter of law or of fact. As matter of law, it was given up in the argument, as no such legal consequence could follow from the premises stated; and, as matter of fact, the averment is in contradiction to the record itself. That shows, that the decree determined nothing in favor of the plaintiff; it dismissed the bill against him with costs, and nothing more.

Some weight was given, in the argument, to the peculiar phraseology of the covenant, on the part of McArthur, wherein it is provided, that, if it should be determined in the chancery suit, that the plaintiff was entitled to any greater portion of the money, directly or indirectly, than the $11,500, then, and

in that case, he would pay, &c. The object of using the words, *directly* or *indirectly*, in the connection found, is, perhaps, at best, but matter of conjecture. But as the chancery suit was against Hobson, for the purpose of asserting claims and demands against him by the complainant, it was, according to the rules of chancery, an inappropriate proceeding for the purpose of asserting claims on the part of the defendant against the complainant. These would have required a cross-bill. But as the suit had become an amicable one, it was provided that the claims of both parties might be settled therein, notwithstanding the irregularity of the proceeding, and hence the use of the peculiar phraseology referred to.

This explanation receives some confirmation from the covenant, on the part of Hobson, with McArthur. These words are there omitted. The suit was appropriate to enforce any claim against him.

It was said, also, and some stress laid upon the remark, that the agreement would not have provided for the voluntary payment of the balance that might be due from one to the other, if it had contemplated an adjustment of the particular amount by the suit in chancery, as, in that event, the payment could be enforced by the decree.

But we think this consideration leads to an opposite conclusion. How could the payment be made at the bank, as provided, unless the amount in dispute was first adjusted.

There was no dispute about the payment, except as respected the amount. That being determined, each party was ready to satisfy it. Besides, it is difficult to believe, that, in providing so specially for the settlement of the controversy by judicial proceedings, the parties had in view simply the determination of the question whether the one or the other had received more of the fund than his share, without regard to the amount. Such a decision would have been idle, as it could lead to no practical result in the settlement of their differences.

Upon the whole, for the reasons stated, we think the judgment below erroneous, and should be reversed, and the cause remanded to the court below for further proceedings.

Mr. Justice WAYNE, being indisposed, did not sit in this cause.

Mr. Justice WOODBURY dissented.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the

District of Ohio, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, for further proceedings to be had therein, in conformity to the opinion of this court.

W. AND H. MASSINGILL, PLAINTIFFS, *v.* A. C. DOWNS, CLAIMANT:

Where a judgment was obtained in the Circuit Court of the United States for the District of Mississippi in 1839, and in 1841 the State of Mississippi passed a law, requiring judgments to be recorded in a particular way, in order to make them a lien upon property, this statute did not abrogate the lien which had been acquired under the judgment of 1839, although the latter had not been recorded in the manner required by the statute.

THIS case came up from the Circuit Court of the United States for the Southern District of Mississippi, upon a certificate of division in opinion between the judges thereof.

The facts are fully set forth in the opinion of the court, as delivered by Mr. Justice McLean, to which the reader is referred.

It was argued by *Mr. Sargent* and *Mr. Bell*, for the plaintiff, and *Mr. Lawrence* and *Mr. Badger*, for Downs, the claimant.

Mr. Sargent and *Mr. Bell* made the following points:—

1. When this judgment was entered, it became a lien on all the personal and real property of Chewning, in Mississippi. Hutch. Miss. Code, 881, 282. Brown *v.* Clarke, 4 How. 12; 4 Stat. at Large, 184; ib. 278; Rankin *v.* Scott, 12 Wheat. 177; United States *v.* Morrison, 4 Peters, 124; Burton *v.* Smith et al., 14 Peters, 464; Tayloe et al. *v.* Thompson, 5 Peters, 358.

2. The rules of court, so far as they are more than declaratory of the effect of the United States process act of 1828, adopt the State practice of November 25, 1839; they adopt nothing prospectively.

3. The State act of 1841 does not purport to operate on federal judgments. No State statute can operate *proprio vigore* to affect directly or indirectly a judgment of the federal courts. Wayman *v.* Southard, 10 Wheat. 1; Bank of the United States *v.* Halstead, ib. 51.